

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 LASERDYNAMICS, INC.,)(
5)(CIVIL DOCKET NO.
6)(2:06-CV-348-TJW-CE
7 VS.)(MARSHALL, TEXAS
8)(
9 ASUS COMPUTER)(JUNE 30, 2009
10 INTERNATIONAL, ET AL.)(8:34 A.M.
11 MOTIONS HEARING
12 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
13 UNITED STATES MAGISTRATE JUDGE
14
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1	I N D E X	
2		
3	June 30, 2009	
4		Page
5	Appearances	1
6	Court Reporter's Certificate	18
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		

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1 P R O C E E D I N G S

2 COURT SECURITY OFFICER: All rise.

3 THE COURT: Be seated.

4 All right. We'll hear argument on the
5 issues raised in the bench briefs that were filed I
6 guess late last week, early this week.

7 The first one that was filed was the bench
8 brief regarding January 21 order and nonproduction of
9 drive tracing documents.

10 Mr. Luck?

11 MR. LUCK: Good morning, Your Honor.

12 THE COURT: Morning.

13 MR. LUCK: The relief we sought was to
14 preclude the introduction of documents and other
15 evidence produced outside the 15 days after the January
16 21st order. In light of the Court's order and in light
17 of the response, including the stipulation from
18 Defendants on the use by their damages expert that he
19 would not rely upon a new speculation as to the source
20 of Sony drives, I think almost all of the issues that we

21 saw in their fallout, here again they were speaking --

22 THE COURT: The Malaysian speculation is out

23 then?

24 MR. LUCK: Yes, that's correct, Your Honor.

25 THE COURT: The license issue is out then?

1 MR. LUCK: It is out, and --

2 THE COURT: Okay.

3 MR. LUCK: -- again, we were seeking
4 prospective relief. There's been no violation to date,
5 but --

6 THE COURT: Oh. I under -- I understood
7 that from your -- your papers, but I just wanted to --
8 if I can glean a prospective problem, I wanted to solve
9 it. Okay?

10 So what about the -- the estimate? There's
11 a -- the second item that you had set forth in your
12 papers?

13 MR. LUCK: Infringement?

14 THE COURT: Yes, sir.

15 MR. LUCK: We believe if -- again, if the
16 Defendants adhere to their commitment promise not to use
17 financial documents produced outside the Court's order,
18 that oughten be an issue either.

19 THE COURT: Okay. And -- so what you're
20 telling me is it's -- at least two of the four are at

21 least moot at this point and you don't have any reason

22 to think the other two are going to materialize?

23 MR. LUCK: That's correct, Your Honor.

24 THE COURT: All right. That's what I --

25 takes care of that one.

1 Now, then, the second one that was filed was
2 I believe the Defendants' bench brief regarding untimely
3 damages disclosures in discovery.

4 MR. PLATT: That's right, Your Honor.

5 So under the amended discovery order back in
6 2007 they were supposed to provide us with a calculation
7 of damages. That -- they promised, promised, promised
8 to get it to us, but they supplemented. They didn't
9 have a computation in there. The first computation
10 where they had done the math and put together a number
11 happened just last week. I believe that's right. It
12 was -- but they -- that was the first time they had
13 given us a number where Mr. Davis had actually and gone
14 through and said, well, these drives are in and I'm
15 going to multiply it here and these drives are in, I'm
16 going to multiply it here and I'm going to add it up.

17 That was a change in his theory because
18 originally he had -- there was issues of double counting
19 that our expert had pointed out. Your Honor is aware
20 that he supplemented his report. He never addressed

21 that double counting, and now he's trying to shift the
22 theory so as to account for that double counting,
23 something that we haven't heard of before.

24 THE COURT: Okay. Well, in light of the
25 Court's ruling yesterday -- I mean, aren't both experts

1 going to have to do some massaging to their damages
2 numbers?

3 MR. PLATT: I think our expert's report
4 allows for him to do that. I -- I think he anticipated
5 different scenarios in his report.

6 THE COURT: Okay. All right.

7 MR. PLATT: I don't think it's the same for
8 their expert.

9 THE COURT: Okay. Tell me what -- tell me
10 what's changed and why I ought to allow this
11 supplemental computation, Mr. Luck.

12 MR. LUCK: Initially, Your Honor, I am at
13 fault for the way I characterized this disclosure. That
14 was not an amendment to the Davis report. He did not
15 intend for that to be a amendment. That was just a
16 summary of his testimony in the deposition. In the
17 deposition he indicated he was at the end of the day and
18 the numbers had bottomed out in light of pending issues
19 before the Court which had been addressed. He indicated
20 he would multiply the rate times the base.

21 I was incorrect in the letter I sent
22 indicating this was an amendment to the Davis report.
23 That is not correct. It was just a summary of his
24 testimony in the deposition.
25 Specifically, the -- the numbers we would

1 like to present in a summary of the deposition, similar
2 to the attachment to -- I believe it's Exhibit G, except
3 the numbers for QSI which we understand from the Court's
4 order will now fall away.

5 Also, the -- the line indicating QSI direct
6 and indirect, that will also fall away because that --
7 that issue about the double counting is moot now.

8 So specifically to answer the Court, we
9 would like for Mr. Davis to rely upon a similar --

10 THE COURT: Unless you've got other evidence
11 that QSI sells direct into --

12 MR. LUCK: Correct, Your Honor.

13 THE COURT: -- the country. I -- what I'm
14 hearing from you is that you do not have that?

15 MR. LUCK: There is some direct, but it's a
16 very, very small amount.

17 THE COURT: Okay. So you want to focus on
18 the QCI numbers that are included in his report?

19 MR. LUCK: That's correct, Your Honor.

20 THE COURT: Okay. All right.

21 MR. PLATT: If I could just point out, Your
22 Honor, the concern we have with that is he originally
23 had done two separate analysis. He's done QC -- or he
24 -- I'm sorry, he didn't do the calculation. But he had
25 set out QCI numbers, and he had set out the QSI numbers.

1 Okay.

2 You -- if you do what he did with the QSI
3 numbers, it's a much different damages number, much
4 lower than if you do the QCI numbers. He didn't tell us
5 which one he was going to do at trial, so they shouldn't
6 be allowed to get up there now and say we're going to
7 put on just the QCI numbers when he also put numbers up
8 for QSI just so they can get a higher damages number
9 which is something they haven't disclosed to us.

10 THE COURT: Well, was the rate of -- that
11 was applied to the QCI numbers higher than it was with
12 respect to the QSI numbers because they were in
13 integrated computer systems?

14 MR. PLATT: Right. He applies a two percent
15 royalty --

16 THE COURT: All right. I'll overrule that
17 objection then. I -- I'm going to allow you to
18 supplement it. What I need is -- I need a motion for
19 leave from you that attaches the calculations that you
20 intend to present to your -- through your damages

21 expert. Okay? I need that attached.

22 I'm -- given what you've told me that the

23 one that you've served is going to fall out, I'm going

24 to -- I'm excluding that as a summary. Okay? But what

25 you need to do is you need to file a motion for leave to

1 amend his report and to present the numbers in light of
2 the Court's ruling on the license issue. Okay?

3 MR. LUCK: Thank you.

4 MR. PLATT: And, Your Honor, will we be able
5 to respond to that?

6 THE COURT: Yes --

7 MR. PLATT: Okay.

8 THE COURT: -- you can. But I'm just -- you
9 know, I -- if it's essentially what you've told me
10 today, I'm going to allow them to do it, so I need to
11 get that on file, Mr. Luck, sometime, you know, today.
12 Get your response in before close of business. Okay?

13 MR. LUCK: Next --

14 THE COURT: Well, not before -- if they file
15 it at 4 o'clock, then I'm not going to make you respond
16 by close of business, but I need -- I need the motion
17 for leave, you know, soon as I can get it, Mr. Luck.
18 Okay?

19 MR. LUCK: Yes, Your Honor.

20 MR. PLATT: Your Honor, just to be clear, we

21 weren't going to oppose their motion for leave, we just
22 wanted to be able to respond to their damages numbers.

23 THE COURT: Okay.

24 MR. PLATT: To have our expert look at what
25 they're going to do and then respond.

1 THE COURT: Well --

2 MR. LUCK: If you would like, you can confer

3 with him this morning to --

4 THE COURT: In light -- in -- in light of

5 what the Court's done on the licensing issue, I think

6 that's appropriate. I think y'all ought to confer on

7 it. Okay? But I'm not going to -- not intending to

8 hamstring your expert though as to -- if he has to

9 respond to something that's no longer being presented.

10 Okay? But focus him up on the QCI price. All right?

11 MR. LUCK: Okay.

12 THE COURT: Okay. Number 2, precluded from

13 relying on facts not disclosed during discovery.

14 I've read the response to the interrogatory

15 that was served. I've also read the response to the

16 motion for summary judgment that was filed. How is it

17 different?

18 MR. PLATT: I think, Your Honor, wasn't --

19 it wasn't put in a discovery response.

20 THE COURT: All right. I'll overrule that

21 objection, too, then. I'll allow that supplementation.

22 The next one is Quanta defendants'

23 noninfringement defenses. I believe this was filed

24 either last night -- yeah, last night -- with regard to

25 the S-curve theory.

1 MS. SANGALLI: That's correct, Your Honor.

2 They -- they had their -- their
3 noninfringement defenses have been limited to their --
4 either S-curve theory or the position that Plaintiff has
5 not met their burden of proof.

6 And the problem with the S-curve theory
7 that's in their contentions -- they basically have three
8 different types of argument in there. One of them, it
9 is our position, is contrary to the Court's claim
10 construction.

11 Another one is that they're basically trying
12 to use -- they're -- they're trying to use statements
13 that were made during the re-examination to limit the
14 scopes -- scope of the claims. Now, that's claim
15 construction. That's not noninfringement.

16 And the third problem that they have is that
17 they're comparing the accused device to the prior art
18 rather than comparing the accused device to the claim.
19 That's an improper way to present a noninfringement
20 position.

21 If they're allowed to say that we don't --
22 we don't infringe because we practice what the prior art
23 is, we think that would be confusing to the jury.
24 So given that those are the -- you know,
25 basically the three different arguments that they have

1 made in their contentions with respect to the S-curve
2 theory and our position really is that there's nothing
3 really that they can present anymore on the S-curve
4 theory and it would be limited to just presenting a
5 noninfringement defense based on failure to satisfy the
6 burden of proof.

7 THE COURT: Okay. Let's hear a response.

8 MR. PLATT: Your Honor, we went over this
9 before. I think this is an untimely motion for
10 reconsideration. We did put S-curve in our
11 interrogatory response. The Court said we'd be able to
12 argue the S-curve theory. We do not plan on going
13 outside the scope of what our response is. We're aware
14 of the Court's order, and we're going to comply with
15 that.

16 THE COURT: Okay.

17 MR. PLATT: With respect to -- about going
18 against the claim construction, they cherry-picked some
19 language out of our expert's deposition that say he's
20 contradicting it. That's not the case. He's not going

21 to testify that way in court. He's not going to -- he's
22 not going to contradict the Judge's claim construction.
23 That's not going to happen, but --
24 THE COURT: That's usually the \$64,000
25 question, whether he's consistent with claim

1 construction.

2 Here's what I'm going to let you do. Okay?

3 You can't argue that you're just practicing the prior

4 art because that's the improper comparison. Okay? Your

5 expert can testify that the S-curve theory does not meet

6 the limitations of Claim 3 as construed by the Court.

7 Okay? That -- you understand the --

8 MR. PLATT: Yes.

9 THE COURT: -- distinction is?

10 MR. PLATT: Yes.

11 THE COURT: And how -- how much testimony is

12 he expected to offer with respect -- with regard to the

13 re-exam proceedings and -- and all of that?

14 MR. PLATT: I think with respect to the

15 re-exam proceedings, it's pointing out that he reviewed

16 that and reviewed the patent and our statement regarding

17 what their patent covered, that it did -- it basically

18 argued to the patent office that they didn't -- that it

19 didn't cover s-curve.

20 THE COURT: Well -- okay. When you -- it

21 seems to me to be a -- an issue of claim construction,

22 though, correct?

23 MR. PLATT: Well, I think the issue there,

24 Your Honor, is that -- you know, there's the old adage

25 that that which, you know, later in time infringes,

1 earlier in time --

2 THE COURT: Anticipates.

3 MR. PLATT: -- anticipates. And there was

4 prior art that came up. It has the S-curve in it, and

5 they told the patent office that's not what we're

6 covering and we think the jury should be allowed to

7 cover -- allowed to consider that.

8 THE COURT: Okay. Here's what I'm going to

9 -- here's what I'm going to do with respect to that.

10 I'm going to sign a written order that outlines exactly

11 how far he can go into the re-exam. I mean, I

12 understand the adage about that which infringes later

13 anticipates it before, but the burdens of proof are

14 different before the jury. And I'm not sure that -- I'm

15 not sure, there may be other limitations involved other

16 than the S-curve theory that -- that -- that were being

17 discussed in the re-exam, but I'll take a look at that

18 and I'll give you a written order on -- on how far you

19 can go in discussing what the applicant said to the

20 examiner and what the examiner said back regarding

21 S-curve.

22 But what I'm not precluding you from -- I'm

23 allowing you at this point to present a theory that the

24 S-curve method does not infringe the properly construed

25 claims of the '981.

1 What I'm not allowing you to do at this
2 point is saying that all you're doing is practicing
3 prior art. Okay?

4 MR. PLATT: Got it.

5 THE COURT: All right. And I'll get you a
6 more detailed order on that one. That one seems to me
7 to necessitate a more formal order.

8 What else can I do for y'all this morning?

9 MR. LUCK: Fine here, Your Honor.

10 Your Honor, I believe we would like a
11 running objection regarding the prior agreements. I
12 think the Court has already spoken to an issue in
13 limine, but for trial we would like the Court to issue a
14 running objection as to the fact it is -- I mean, to
15 note our objection to the Court's ruling that the prior
16 agreements are able to come in.

17 THE COURT: I understand. I saw the filing
18 for it. Have you conferred with the other side about
19 the form of a proper running objection?

20 MR. RAMBIN: We provided this -- this

21 document to opposing --

22 THE COURT: Why don't y'all talk about it

23 and then raise that at the first break upstairs with

24 Judge Ward since I'm pretty sure that y'all don't want

25 me instructing these two folks that are sitting over

1 here in this jury box. Okay? He'll -- he'll be the one
2 that gives the instruction. I want to make sure that
3 what you present to him has been conferred upon and that
4 he's comfortable with it. Okay? Because he'll be
5 giving it, not me.

6 MR. LUCK: Thank you, Your Honor.

7 THE COURT: All right. All right.

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1 CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a
4 true and correct transcript from the electronic
5 recording of the proceedings in the above-entitled
6 matter to the best of my ability.

7

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SUSAN SIMMONS Date
10 Official Court Reporter
State of Texas No.: 267
11 Expiration Date: 12/31/10

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